



McCleary City Council

AGENDA

March 25, 2015

7:00 City Council Meeting

- **Flag Salute**
- **Roll Call**
- **Public Comment** - Kayla Dunlap, Public Affairs Manager:
Presentation regarding the Port of Grays Harbor
- **Public Hearings**
- **Minutes:** - Approval (Tab A)
- **Mayor's Comments:** - Discussion
- **Staff Reports:** - Dan Glenn, City Attorney (Tab B)
- Todd Baun Staff Report (Tab C)
- **Old Business:**
- **New Business:** - Itron Sales Agreement (Tab D)
- ATV Proposed Routes (Tab E)
- 3rd Street Design Questions (Tab F)
- 3rd Street Contract Time Extension (Tab G)
- Accident Prevention (Tab H)
- Storm Pond Discussion (Tab I)
- **Ordinances:** - ATV Ordinance (Tab J)
- Astound WAVE Broadband Ordinance Draft B (Tab K)
- **Resolutions:**
- **Approval of Vouchers**
- **Mayor/Council Comments**
- **Public Comment**
- **Executive Session**
- **Adjournment**

Americans with Disabilities Act (ADA)
Accommodation is Provided Upon Request

Please Turn Off Cell Phones – Thank You

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La ciudad de McCleary es un proveedor de igualdad de oportunidades y el empleador.

CITY OF MCCLEARY
Regular City Council Meeting
Wednesday, March 11, 2015

ROLL CALL AND FLAG SALUTE Councilmember's Reed, Schiller, Catterlin, Ator and Peterson.

ABSENT Mayor Dent was absent. Mayor Pro Tem Ator chaired the meeting.

STAFF PRESENT Present at the meeting were Todd Baun, Wendy Collins, George Crumb, Dan Glenn, Paul Nott and Randy Bunch.

PUBLIC COMMENT Chris Vessey is highly upset with the draft sheriff contract and doesn't think it's what's best for the City. He doesn't like the county asking for our police cars and for the City to provide office space and equipment. The contract doesn't say anything specific about 40-hour per week coverage with two deputies. Mr. Vessey sees a whole lot of questions that need to be answered. He believes the citizens of McCleary should be entitled to have a town hall meeting to discuss what they want for police services. He doesn't believe the City should approve the contract.

 Sue Portschy doesn't like the contract either. She's concerned about vicious dogs in town and wants to know who would respond if someone gets attacked and bit while walking. Will the county respond to dog complaints? The McCleary Police respond in a matter of minutes.

 Gary Atkins is on the fence with the draft contract. He has been doing research and believes the City needs to come up with a solution because neither the Sheriff's office or the City Police have come forward to tell the citizens what they will do for us. He stated the Council needs to have a game plan to help with revenue and with the drug issues. He doesn't believe we will attract businesses if we don't clean up the drug areas. He thinks it would be a good idea to consider a merge with either Shelton or Elma Police or with another city.

 Brenda Orffer read the draft contract and said it is not on par with what was presented by the Council. She stated that contracting out police services comes at too high of a price to warrant what the savings are supposed to be. Her family home was recently burglarized while her 14-year old daughter was at home. She said safety cannot be assured or measured. She asked what would prevent the cash-strapped county, as its budget continues to suffer, from paring back from even the vaguely promised components of this deal. She stated this is a huge county and she sees no guarantee that our safety here in McCleary would be a priority. She said the Council made a mistake when taking two ballot measures to the vote of the people. She said there is never success when two measures are proposed. The Council should have proposed only one solution and worded it carefully so all of the Council's desired needs were presented. She urges the Council to keep the police force in McCleary and not outsource it away.

 Helen Hamilton brought a letter written by Mrs. James to be read to the Council. Joy Iverson read it for her. The letter stated many concerns over the County taking over the police department. She is not in support of a contract with the Sheriff.

 Joy Iverson was impressed by June Arndt's story about her son, which she shared at the last Council meeting. Joy said if the Council has a town hall meeting, she likes the idea of having both the County Sheriff and the Police Chief be present. She would like the community to have an opportunity to ask them both what they can provide the citizens of McCleary for police protection.

MINUTES APPROVED **It was moved by Councilmember Peterson, seconded by Councilmember Reed to approve the minutes from the February 11, 2015 meeting. Motion Carried 4-0.**

CITY ATTORNEY REPORT Dan Glenn provided a written report for the Council.

MAYOR'S COMMENTS None.

DIRECTOR OF PUBLIC WORKS REPORT Todd Baun provided a written report to the Council.

CITY COUNCIL 2015 CALENDAR **It was moved by Councilmember Schiller, seconded by Councilmember Catterlin to accept the 2015 calendar as is and make adjustments later, if necessary. Motion Carried 4-0.**

GRAYS HARBOR COUNTY
SHERIFF DRAFT CONTRACT

Councilmember Catterlin stated the draft contract is a beginning document and we need to write down what we don't like about it and send it back to the County. He added that he does not agree with not listing the hours of patrol and he would like to see us keep the cars.

Councilmember Schiller said there was no language about "special events" coverage. He said he's only had the draft contract since Monday so it hasn't given him enough time to review it entirely. He added that the police budget this year is \$417,000, compared to \$570,000 last year. We've already expended 30% of the police budget and we are only in to March. We are already having problems with our current budget. He said they protected \$150,000 from not being spent. He asked again what level of service is the city willing to accept for police services. He said that is the bottom line here. Normally we have eight people at the meetings and tonight there is a large turnout because of the contract. He said we can keep the police but we need to figure out what level of service we can accept and afford. That is not being a politician. it is the bottom line.

Councilmember Catterlin said property taxes are down in the city so it decreases the tax revenue the city receives, which is the main source of revenue that pays for the police department. It's not a question of what the Council likes or prefers, it's the facts that they have to deal with.

Brenda Orffer said the tax revenue will drop considerably if we do not have a police department because that is what happened in Tenino. She did research over a ten-year time period and found that since they got rid of their police department, they now have graffiti, drugs, and people speeding through town. She said because of this, people left that city in hordes and now landlords don't even want to have rentals in Tenino because they don't have police coverage.

Pastor Brian Orffer asked if the City can operate the police department for \$225,000, which is the amount the County is asking. Councilmember Schiller said he spoke to John Graham about it but he hasn't heard anything back yet. He said the question is what type of coverage can we afford. What is the minimum the City can operate at off of an affordable cost? Pastor Orffer asked why should we go with less with the County when maybe we can go with just a little bit less and keep our department? Councilmember Schiller has been asking that same question for years.

Dan Glenn stated that Scott Snyder, the labor consultant, is discussing these matters, along with alternative solutions, with the union. He anticipates a report by either the next meeting or the first meeting in April.

Mr. Dunning asked how many employees have been hired over the last twenty years and wanted to know if we need all these employees. Todd Baun responded by saying he isn't sure exactly how many have been hired over the last twenty years, however, that would be like comparing apples and oranges. The police are funded by current expense and most of the other employees are split between utility funds so eliminating people or positions would not help the current expense deficit or benefit the police department in any way. He said we have to answer to the state auditor and have to account for the money according to their requirements. The majority of the police department is funded by property taxes. Mr. Dunning asked if we can change the law or rules and Todd said we would have to change the state constitution.

FUTURE TOWN HALL MEETING
DISCUSSION

Councilmember Schiller has lived here since 1993 and not much has changed as far as businesses go. He would like to have a town hall meeting to talk about the city, in general, and how to move forward toward success. He wants to bring the residents together to talk about how to bring the community together and move our town forward on all issues, not just regarding police services. He is willing to sponsor and set up the meeting. He said we have a major challenge in front of us and he wants to hear the public's input. Councilmember Ator said if Councilmember Schiller sets it up, he will be there. Mr. Schiller would appreciate it if all of the Councilmembers attend, along with the public. He will propose a date at the next meeting. Joy Iverson would like to see people bring a list of ideas and be prepared with suggestions and not just come to talk.

JOHN DEERE MOWER
PURCHASE

It was moved by Councilmember Catterlin, seconded by Councilmember Schiller to authorize the purchase of a new riding lawn mower for \$9,630.53, including tax from the Washington State Contract #10212. Motion Carried 4-0.

ATV ORDINANCE Conversation took place regarding the use of ATV's on certain city streets. **It was moved by Councilmember Catterlin, seconded by Councilmember Reed to adopt the Ordinance. Councilmember Schiller asked to hold off until the next meeting until Todd Baun can work up a street allowance map to show street locations for where they would be prohibited and where they would be allowed. Councilmember Catterlin moved and Councilmember Reed seconded to withdraw the motion for adoption until the next meeting. Motion Carried 4-0.**

ASTOUND WAVE BROADBAND
ORDINANCE DRAFT B The Council understands this will not generate much revenue for the City other than pole and rental fees. Dan Glenn stated that communication's change frequently so by opting in, we will have availability, which could benefit the City at a later date. If they build later and we had chose to opt out, they will go around us and we will miss out. The ordinance was tabled until the next meeting.

PUBLIC COMMENT Councilmember Catterlin asked about the financial printouts they were provided. Wendy Collins stated they were to be distributed to the Council, per the Mayor's request. Mayor Dent did not want the topic as part of the regular agenda so they were given to the Council for review. The reports were printed on March 5, 2015. One of the them is for the current expense fund and the other is a detailed report for the police department fund. One of the requirements made during the passing of the budget ordinance was the condition that the police budget be approved on a month-by-month basis by the Council. The reports are to comply with that provision.

APPROVAL OF VOUCHERS Accounts Payable vouchers/checks approved were 39188 - 39241 including EFT's in the amount of \$165,324.00 and 39248-39280 including EFT's in the amount of \$47,727.89.

Payroll checks approved were 39158 - 39187 and 39242-39247 including EFT's in the amount of \$146,283.33.

It was moved by Councilmember Peterson, seconded by Councilmember Reed to approve the vouchers. Motion Carried 4-0.

EXECUTIVE SESSION None.

MEETING ADJOURNED **It was moved by Councilmember Ator, seconded by Councilmember Peterson to adjourn the meeting at 8:00 pm. The next meeting will be Wednesday, March 25, 2015 at 7:00 pm. Motion Carried 4-0.**

Mayor Gary Dent: _____

Clerk-Treasurer Wendy Collins: _____

MEMORANDUM

TO: MAYOR AND CITY COUNCIL, City of McCleary
FROM: DANIEL O. GLENN, City Attorney
DATE: March 20, 2015
RE: LEGAL ACTIVITIES as of MARCH 25, 2015.

THIS DOCUMENT is prepared by the City Attorney for utilization by the City of McCleary and its elected officials and is subject to the attorney-client privileges to the extent not inconsistent with laws relating to public disclosure.

1. **OPEN GOVERNMENT "TRAINING" SESSION:** I imposed upon Ms. Collins to provide you information about a program being put on by the SAO in terms of updating information as to the impacts/requirements upon municipal governments such as McCleary's and its officials. As you know from reading the email, it was held on the 24th. Due to the timing and the location, it is not easy for elected officials from our area, such as the six of you, who have other demands upon your time, to attend. It is my hope we will be able to access this session at a later stage through the ever more present webinar system.

I will keep you informed.

2. **PRIVATE STORMWATER PONDS:** As you are aware from prior reports, Mr. Baun, Ms. Collins, and I are working through developing a suggested approach in terms of funding the maintenance of certain stormwater ponds the ownership of which was retained by the Homeowner's Associations (HOA). It is my understanding the condition of the ponds at the time of approval of the plat by the City was acceptable. What has happened, to one degree or another, for the developments involve is the following pattern.

A. The developer left the scene, either because the lots were all sold or, more often, the ownership of the unsold

lots was forfeited by the lender and the lender then sold the lots to another owner.

B. Even though more likely than not the owners received a copy of the Covenants, Conditions, and Restrictions (CC&Rs) governing the development and setting forth the existence duties of the HOA, the individuals who purchased lots in the development did not internalize the responsibilities resulting from the ownership.

C. Either unintentionally or intentionally, the HOA non-profits were allowed to lapse.

D. In the absence of the HOA, no maintenance action has been taken.

Mr. Baun has been in contact with the various owners providing certain options the three of us discussed. One response has been received expressing the opinion that the developer's successor in interest should be responsible for funding the necessary maintenance. Unfortunately, once the pond was accepted as meeting the guidelines, it became the owners' responsibility through membership in the HOA. Hopefully, we will be able to work through this situation in a manner acceptable to the owners and not imposing additional costs on the owners of the other properties within the City.

3. **ASTOUND COMMUNICATION FRANCHISE**: I have received a response indicating basic acceptance of my suggested modifications. They have requested a few "minor" modifications. I have imposed upon Ms. Collins to provide you a copy of the draft which marks the requested changes. It is anticipated that a representative of the Company will be present at tonight's meeting to answer any questions you might have prior to taking any action.

4. **ITRON AGREEMENT**: Mr. Baun will be reporting more fully upon this contract. It is the usual information processing agreement under which the company is to provide services, be paid for them, and is not responsible for any consequential damages resulting from a problem. Not what we would normally want, but these are really not negotiable nor are the risks great. So, I would recommend the Mayor be authorized to executed the annual agreement.

5. **ENHANCED ATV ROAD USAGE ORDINANCE**: It is my understanding that Mr. Baun will have recommendations as to certain streets within the City the usage of which he will be recommending be denied. They will have to be named in an attachment to the ordinance and, in the matter of enforcement, be

properly posted with that limitation. Once you receive his recommendation and provide us the direction as to your position on this matter of restriction, either the matter can move to a final vote, if the decision is to not restrict, or I will prepare an attachment and the matter will be back on before you for consideration and action at your next meeting.

6. **PUBLIC RECORDS ISSUE:** Given the events through which we are working in Montesano, as I have to Elma's elected officials, I would strongly recommend that all Council Members and the Mayor utilize only the City email addresses and system for anything which even remotely is associated with your role as an elected official. Also, that the use of your personal cellular telephones for the sending and receiving of messages in relation to City "stuff" be recognized as likely creating a public record under the Public Record Act.

At this stage, there are a number of judicial cases currently "in process" in various courts throughout the State in terms of the enforcement of requests for documents covered under the Public Records Act which may be on an official's personal cellular telephone, computer, etc. For instance, the text messages sent on the cellular telephone of the Pierce County Prosecutor were found to be public records subject to maintenance and provision upon request.

The use of the address provided by the City and the resulting provision of the automatic storage upon the City's computer system is becoming ever more important in relation to keeping life simple. It makes the services provided by our information processing and storage entity ever more important. (Given the recent media attention, I have no doubt Ms. Clinton would agree, although apparently Mr. Clinton has indicated he has sent only a couple of emails during his career and instead communicated by unrecorded telephone calls. Perhaps a wise move for all to consider.)

7. **FIRE DISTRICT #5 REQUEST FOR AUTOMATIC RESPONSE AGREEMENT:** This was referenced at your last meeting. It sets forth protocols under which the two agencies will be automatically toned out for certain incidents in the other's service area. It is my understanding that Chief Nott is comfortable with it as modified as being mutually beneficial to both entities. Subject to Paul's confirmation of the Department's position, I would recommend the Council authorize the Mayor to execute the agreement with one modification. That modification is the inclusion of language which makes it clear the agreement is not for the benefit of third parties.

While it may seem arcane, absence of that language can lead to the possibility that some one who suffers injury or loss in an incident within one jurisdiction to which the other did not respond would contend they were entitled to the legal benefit of that response. It is the bottom line of that old Satsopian phrase that "no good deed goes unpunished."

8. 3rd STREET "DESIGN QUESTIONS" AGENDA ITEM: Given the discussion at the last meeting of Council Member Schiller's suggestion of holding a public workshop to obtain citizen comments on what they think about steps to be taken for the development of McCleary's future, I thought it ironic this item would appear on the agenda. I have no idea as to what issues are the subject of the "questions", but it is that very sort of thing about which such meetings are held since this street is basically one of the three most important streets in the City.

Enough said.

As always, this is not meant to be all inclusive. If you have any questions or comments, please direct them to me.

STAFF REPORT

To: Mayor Dent
From: Todd Baun – Director of Public Works
Date: March 20, 2015
Re: Todd Baun Staff Report

No Staff Report

ITRON SALES AGREEMENT

This Itron Sales Agreement (the "**Agreement**") is entered into as of January 15, 2015 (the "**Effective Date**") by and between Itron, Inc. ("**Itron**") and the City of McCleary, WA ("**Customer**"). Itron and Customer may each be referred to as a "**Party**" and together as the "**Parties**."

The Parties agree as follows:

1. Cloud Service Terms

a. Access to Cloud Service.

Subject to the terms of this Agreement, Itron grants to Customer, for its internal business purposes only, the non-transferrable, non-exclusive right to access and use the service identified on Attachment A (the "**Cloud Service**") in accordance with the terms of service attached hereto as Attachment B (the "**Terms of Service**").

b. Use Restrictions.

Customer is responsible for maintaining the confidentiality of all information required to access the Cloud Service and for the activities of its employees or representatives that access the Cloud Service. Customer will not (i) access or use the Cloud Service other than in accordance with the Cloud Service documentation; (ii) reverse engineer the software underlying the Cloud Service; (iii) engage in any activity that interferes with or disrupts the Cloud Service or any servers or networks connected to the Cloud Service; (iv) allow a third party to access the Cloud Service or operate the Cloud Service for the benefit of a third party, including as a service bureau; (v) modify or create derivative works based on the Cloud Service; or (vi) use the Cloud Service in a manner that violates any law or regulation or the rights of any third party.

c. Cloud Service Term.

Itron will make the Cloud Service available to Customer for an initial one-year period beginning on the Effective Date. Thereafter, Itron shall provide the Cloud Service for successive one-year periods unless the Cloud Service is terminated in writing by either Party at least 90 days prior to the end of the then-current one-year period.

d. Invoicing.

Itron shall invoice Customer for the initial annual Cloud Service fee identified on Attachment A immediately following the Effective Date. Thereafter, Itron shall invoice Customer for each successive one-year period prior to the commencement of such period. Itron may elect to increase the annual fee for any successive annual period by providing Customer with written notice of such increase at least 90 days prior to the commencement of such period.

e. Customer Data.

Customer retains all right, title and interest in and to any electronic data or information contained in any database, table or similar file or document provided by Customer for use in connection with any Cloud Service (the "**Customer Data**"). Customer grants to Itron a license to use the Customer Data to the extent necessary for Itron to provide the Cloud Service, or as required by law. Customer is solely responsible for the Customer Data, including providing the Customer Data required for proper operation of the Cloud Service, and will not provide, post or transmit any Customer Data or any other information or material that: (i) infringes or violates the rights of any third party or any law or regulation or (ii) contains any virus or programming routine that has the effect of damaging, surreptitiously intercepting or expropriating any system, data or personal information. Itron may take any remedial action it deems advisable to address any violation of this Section but Itron is under no obligation to review Customer Data for accuracy or potential liability. Customer agrees to indemnify Itron for any loss or damage suffered by Itron in connection with Customer's breach of its obligations under this Section.

f. Service Levels.

Itron agrees to make commercially reasonable efforts to: (i) maintain Appropriate Security Measures (defined below); (ii) provide regular backups for the Customer Data as further described in the Terms of Service; and (iii) make the Cloud Service generally available 24 hours a day and 7 days a week except for (y) planned downtime in accordance with the Terms of Service and (z) downtime caused by circumstances beyond Itron's reasonable control, including telecommunications or network failures or delays, computer failures that could not reasonably have been prevented by Itron or acts of vandalism (e.g., network intrusions and denial of service attacks). Itron's sole obligation, and Customer's exclusive remedy, in connection with a breach of any obligation of Itron with respect to the performance or availability of the Cloud Service shall be for Itron, at its option, to correct the failure or to refund to Customer the amount paid for the Cloud Service for the period in which it was affected. Customer's subscription to the Cloud Service shall terminate upon its receipt of any such refund. "**Appropriate Security Measures**" means customary technical, physical and procedural controls to protect Customer Data against destruction, loss, alteration, or unauthorized disclosure to third parties. Customer acknowledges that, notwithstanding Appropriate Security Measures, use of or connection to the Cloud Service presents the opportunity for unauthorized third parties to circumvent such precautions and illegally gain access to the Cloud Service and Customer Data. Accordingly, Itron does not guarantee the privacy, security or authenticity of any information stored in connection with or transmitted to or from any Cloud Service.

g. Federal Communications Commission ("FCC") Licensed Facilities.

Customer acknowledges and agrees that Itron maintains the exclusive right to operate and control any Federal Communications Commission ("FCC") licensed facilities involved in the provision of services, including the transmitter and other components that produce RF energy (e.g. Itron Cell Control Units, Endpoints, etc.). Itron will make all decisions regarding any FCC licenses used to implement the Cloud Services provided for by this Agreement, including the preparation and filing of applications with the FCC.

2. Payment Terms and Taxes.

For invoices not paid within 30 days of the invoice date, in addition to other remedies to which Itron may be entitled, Itron may charge Customer a late fee of one percent per month applied against overdue amounts. Customer shall also be responsible for collection

costs associated with late payment, if any, including reasonable attorneys' fees. No endorsement or statement on any check or payment or in any letter accompanying a check or payment or elsewhere shall be construed as an accord or satisfaction. Unless otherwise indicated on Attachment A, Customer shall pay all amounts owing under this Agreement in U.S. Dollars. The prices set forth on Attachment A do not include taxes. Customer will be responsible for and pay all applicable sales, use, excise, value-added and other taxes associated with the provision of products or services by Itron, excluding taxes on Itron's income generally. If Customer is a tax exempt entity, or pays taxes directly to the state, Customer will provide Itron with a copy of its Tax Exemption Certificate or Direct Pay Permit, as applicable, upon execution of this Agreement.

3. Changes.

Changes to the products or services ordered by Customer pursuant to this Agreement, including the purchase of additional quantities or entirely new products or services, may be made at Itron's then-current pricing by purchase order or Change Order (in a form acceptable to Itron), provided that any such purchase order must first be accepted by Itron.

4. Confidentiality.

With respect to any information supplied in connection with this Agreement and designated by either Party as confidential, or which the recipient should reasonably believe to be confidential based on its subject matter or the circumstances, the recipient agrees to protect the confidential information in a reasonable and appropriate manner, and to use and reproduce the confidential information only as necessary to realize the benefits of or perform its obligations under this Agreement and for no other purpose. The obligations in this Section will not apply to information that is: (i) publicly known; (ii) already known to the recipient; (iii) lawfully disclosed by a third party; (iv) independently developed; or (v) disclosed pursuant to a legal requirement or order. The recipient may disclose the confidential information on a need-to-know basis to its contractor's, agents and affiliates who agree to confidentiality and non-use terms that are substantially similar to these terms. The parties acknowledge and agree that any software provided by Itron in connection with this Agreement shall be considered the confidential information of Itron.

5. IP Ownership.

Between Itron and Customer, all patents, copyrights, mask works, trade secrets, trademarks and other proprietary rights in or related to any product, software or deliverable provided by Itron pursuant to this Agreement are and will remain the exclusive property of Itron. Any modification or improvement to an Itron product or deliverable that is based on Customer's feedback shall be the exclusive property of Itron. Customer will not take any action that jeopardizes Itron's proprietary rights nor will it acquire any right in any such product, software or deliverable or Itron's confidential information other than rights granted in this Agreement.

6. Indemnification

a. General Indemnity.

Itron will defend Customer from any third party claim for (i) wrongful death of or bodily injury, to the extent caused by Itron's gross negligence or intentional torts, or (ii) physical damage to tangible personal property, to the extent caused by Itron's gross negligence or intentional torts, and will pay costs and damages awarded against Customer in any such claim that are specifically attributable to Itron's gross negligence or intentional torts or those costs and damages agreed to by Itron in a monetary settlement of such claim.

b. Infringement Indemnity.

Itron will defend at its own expense any action brought against Customer by an unaffiliated third party to the extent that the action is based upon a claim that any product manufactured, software licensed or service provided by Itron hereunder directly infringes any U.S. patent (issued as of the Effective Date) or any copyright or trademark, and Itron will pay those costs and damages awarded against Customer in any such action that are specifically attributable to such claim or those costs and damages agreed to by Itron in a monetary settlement of such action. The foregoing indemnity does not apply to products not manufactured by Itron or software licensed by third parties.

c. Conditions to Infringement Indemnity.

Itron's infringement indemnity obligations under this Section are conditioned on Customer's agreement that if the applicable product or service becomes, or in Itron's opinion is likely to become, the subject of such a claim, Customer will permit Itron, at Itron's option and expense, either to procure the right for Customer to continue using the affected product or service or to replace or modify the same so that it becomes non-infringing. Such replacements or modifications will be functionally equivalent to the replaced product or service. If the foregoing alternatives are not available on terms that are reasonable in Itron's judgment, Itron shall have the right to require Customer to cease using the affected product or service in which case Itron will refund to Customer the depreciated value of the affected product or service.

d. Exclusions.

Itron shall have no obligation under this Agreement to the extent any claim of infringement or misappropriation results from: (i) use of a product or service, other than as permitted under this Agreement or as intended by Itron, if the infringement would not have occurred but for such use; (ii) use of any product or service in combination with any other product, equipment, software or data, if the infringement would not have occurred but for such combination; (iii) any use of any release of a software or any firmware other than the most current release made available to Customer, (iv) any claim based on Customer's use of a product after Itron has informed Customer of modifications or changes to the product required to avoid such claims and offered to implement those modification or changes, if such claim would have been avoided or mitigated by the implementation of Itron's suggestions, (v) any modification to a product made by a person other than Itron or an authorized representative of Itron, or (vi) compliance by Itron with specifications or instructions supplied by Customer. Itron shall not be liable hereunder for enhanced or punitive damages that could have been avoided or reduced by actions within the control of Customer.

e. Right to Defend.

As a condition to Itron's indemnity obligations under this Agreement, Customer will provide Itron with prompt written notice of the claim, permit Itron to control the defense or settlement of the claim and provide Itron with reasonable assistance in connection with such defense or settlement. Customer may employ counsel at its own expense to assist it with respect to any such claim.

f. Indemnity Disclaimer

THIS SECTION CONSTITUTES ITRON'S SOLE AND EXCLUSIVE OBLIGATION WITH RESPECT TO THIRD PARTY CLAIMS BROUGHT AGAINST CUSTOMER.

7. Warranty Disclaimer.

EXCEPT AS EXPRESSLY SET FORTH IN THIS AGREEMENT, ITRON DISCLAIMS ALL EXPRESS OR IMPLIED WARRANTIES, CONDITIONS OR REPRESENTATIONS INCLUDING, WITHOUT LIMITATION, (I) IMPLIED WARRANTIES OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, (II) WARRANTIES OF TITLE AND AGAINST INFRINGEMENT AND (III) WARRANTIES ARISING FROM A COURSE OF DEALING, USAGE OR TRADE PRACTICE. TO THE EXTENT ANY IMPLIED WARRANTY CANNOT BE EXCLUDED, SUCH WARRANTY IS LIMITED IN DURATION TO THE EXPRESS WARRANTY PERIOD.

8. WAIVER OF CONSEQUENTIAL DAMAGES.

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, IN NO EVENT WILL EITHER PARTY BE LIABLE UNDER ANY CONTRACT, NEGLIGENCE, STRICT LIABILITY OR OTHER LEGAL OR EQUITABLE THEORY FOR COVER OR FOR INCIDENTAL, SPECIAL, CONSEQUENTIAL (INCLUDING LOSS OR CORRUPTION OF DATA OR LOSS OF REVENUE, SAVINGS OR PROFITS) OR EXEMPLARY DAMAGES, EVEN IF THE PARTY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES. ITRON'S PRICING REFLECTS THIS ALLOCATION OF RISKS AND LIMITATION OF LIABILITY.

9. CAP ON LIABILITY.

NOTWITHSTANDING ANYTHING TO THE CONTRARY IN THIS AGREEMENT, EXCEPT FOR A BREACH BY CUSTOMER OF (I) ANY INTELLECTUAL PROPERTY RIGHT OF ITRON OR (II) ANY LICENSE GRANTED BY ITRON HEREUNDER, THE AGGREGATE LIABILITY OF EACH PARTY AND ITS AFFILIATES AND ITS AND THEIR OFFICERS, DIRECTORS, EMPLOYEES OR OTHER REPRESENTATIVES, ARISING IN ANY WAY IN CONNECTION WITH THIS AGREEMENT—WHETHER UNDER CONTRACT LAW, TORT LAW, WARRANTY OR OTHERWISE—SHALL NOT EXCEED THE TOTAL AMOUNT PAID AND PAYABLE HEREUNDER. ITRON SHALL NOT BE LIABLE FOR ANY CLAIM MADE THE SUBJECT OF A LEGAL PROCEEDING MORE THAN TWO (2) YEARS AFTER THE CAUSE OF ACTION ASSERTED IN SUCH CLAIM AROSE. ITRON'S PRICING REFLECTS THIS ALLOCATION OF RISKS AND LIMITATION OF LIABILITY.

10. Term and Termination

a. Term of Agreement.

Unless terminated earlier as provided herein, the term of this Agreement shall be from the Effective Date through December 31st of the year in which any products or services to be provided hereunder have been provided. The term of this Agreement shall thereafter automatically renew for successive one year periods unless either Party provides the other with written notice of its intent not to renew at least 90 days prior to such termination; provided, however, that Customer shall be obligated to purchase and Itron shall be obligated to provide any product or service that is the subject of an unfulfilled order accepted by Itron prior to the time of any such termination. Notwithstanding the foregoing, the term of any license provided by Itron hereunder shall be as set forth in the provision granting such license.

b. Termination for Cause.

Other than Customer's nonpayment which shall constitute a breach of this Agreement if full payment is not received within five (5) days of written notice, either Party may terminate this Agreement by providing the other Party with written notice if the other Party (i) becomes insolvent, executes a general assignment for the benefit of creditors or becomes subject to bankruptcy or receivership proceedings; (ii) breaches its obligations related to the other Party's confidential information; or (iii) commits a material breach of this Agreement that remains uncured for 30 days following delivery of written notice of such breach (including, but not necessarily limited to, a statement of the facts relating to the breach or default, the provisions of this Agreement that are in breach or default and the action required to cure the breach or default).

c. Survival.

Any provision of this Agreement that contemplates performance or observance subsequent to termination or expiration of this Agreement shall survive termination or expiration and continue in full force and effect for the period so contemplated including, but not limited to, provisions relating to warranties and warranty disclaimers, intellectual property ownership, payment terms, confidentiality, waiver of consequential damages, and cap on liability.

11. Miscellaneous

a. Entire Agreement.

This Agreement and any attachments hereto constitute the entire agreement between the Parties with respect to the subject matter hereof and supersede all previous agreements pertaining to such subject matter. All prior agreements, representations, warranties, statements, negotiations, understandings, and undertakings are superseded hereby and Customer represents and acknowledges that it has not relied on any representation or warranty other than those explicitly set forth in this Agreement in connection with its execution of this Agreement. Neither Party shall be bound by terms and conditions imprinted on or embedded in purchase orders, order acknowledgments, statements of work not attached hereto or other communications between the Parties subsequent to the execution of this Agreement.

b. *Amendments and Waivers.*

Any term of this Agreement may be amended and the observance of any term of this Agreement may be waived (either generally or in a particular instance and either retroactively or prospectively), only by a writing signed by an authorized representative of each Party and declared to be an amendment hereto. No delay or failure to require performance of any provision of this Agreement shall constitute a waiver of that provision. No waiver granted under this Agreement as to any one provision herein shall constitute a subsequent waiver of such provision or of any other provision herein, nor shall it constitute the waiver of any performance other than the actual performance specifically waived.

c. *Governing Law; Jury Trial.*

This Agreement and performance hereunder will be governed by and construed in accordance with the laws of the State of Washington without reference to Washington conflicts of law principles or the United Nations Convention on Contracts for the Sale of Goods. THE PARTIES HEREBY UNCONDITIONALLY WAIVE THEIR RESPECTIVE RIGHTS TO A JURY TRIAL OF ANY CLAIM ARISING IN ANY WAY IN CONNECTION WITH THIS AGREEMENT.

d. *Assignment.*

Customer may not assign or transfer its interests, rights or obligations under this Agreement by written agreement, merger, consolidation, operation of law or otherwise without the prior written consent of an authorized executive officer of Itron. Any attempt to assign this Agreement by Customer shall be null and void. For purposes of this Agreement, the acquisition of an equity interest in Customer of greater than 25 percent by any third party shall be considered an assignment.

e. *Publicity.*

Unless otherwise provided in a separate confidentiality agreement between the Parties, each Party may issue a press release following the execution of this Agreement, subject to the other Party's written approval, which shall not be unreasonably withheld. Each Party hereby consents to the other Party's use of its name, URL and logo on its website and in its customer and partner lists for corporate and financial presentations.

f. *Force Majeure.*

Except for monetary obligations hereunder, neither Party will be responsible for any failure or delay in performing any obligation hereunder if such failure or delay is due to a cause beyond the Party's reasonable control, including, but not limited to acts of God, flood, fire, volcano, war, terrorist threats or actions, third-party suppliers, labor disputes or governmental acts.

g. *Notices.*

Any notice required or permitted under this Agreement or required by law must be in writing and must be delivered in person, by facsimile, by certified mail (return receipt requested), or by a nationally recognized overnight service with all freight charges prepaid, to the address set forth below. Notices will be deemed to have been given at the time of actual delivery, if in person, or upon receipt (as evidenced by facsimile confirmation, return receipt or overnight delivery verification). Either Party may change its address for notices by written notice to the other Party in accordance with this Section.

Itron: Attn: General Counsel
Itron, Inc.
2111 North Molter Road
Liberty Lake, WA 99019

Customer: _____

h. *Miscellaneous.*

Headings used in this Agreement are intended for convenience or reference only and will not control or affect the meaning or construction of any provision of this Agreement. If any provision in this Agreement is held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions will in no way be affected or impaired thereby and such provision shall be interpreted so as to best accomplish the intent of the Parties within the limits of applicable law. Any principle of construction or rule of law that provides that an agreement shall be construed against the drafter of the agreement shall not apply to the terms and conditions of this Agreement. This Agreement may be executed in any number of counterparts, each of which when so executed and delivered will be deemed an original, and all of which together shall constitute one and the same agreement. If available, maintenance and support for products will be provided pursuant to a separate maintenance agreement. Itron shall perform all work to be performed in connection with this Agreement as an independent contractor and not as the agent or employee of Customer. All persons furnished by Itron shall be for all purposes solely Itron's employees or agents and shall not be deemed to be employees of Customer for any purpose whatsoever. This Agreement is entered into only for the benefit of Customer and Itron. No other person or entity shall have the right to make any claim or assert any right hereunder, and no other person or entity shall be deemed a beneficiary of this Agreement.

[Signature Page Follows]

Agreed to and accepted:
Itron, Inc.

Customer

Signature: _____

Signature: _____

Print Name: _____

Print Name: _____

Title: _____

Title: _____

Date: _____

Date: _____

Tax Exempt: Yes / No (if yes, attach copy of Tax Exemption Certificate)



Electric / Gas / Water
 Information collection, analysis and application
 2111 N. Moller Rd.
 Liberty Lake, WA 99019
 fax: 866-787-8910
www.itron.com

ATTACHMENT A
 PRICING SUMMARY

Pricing Summary for
City of McCleary, WA

Based on BMR# 6267-14 Ver1 Jul
 Dated July 18, 2014

		Unit Price	Qty	One Time Set Up
Required - One Time Set Up Fees				
1	System Setup and Activation Fee (MV-90 xi)	\$25.00	1	\$25.00
(MV-90 xi set up fees can be waived for single instance setups for more than 50 standard, non-totalized Endpoints if data is provided in the correct format)				
2	System Setup and Activation Fee (MV-Web)	\$25.00	1	\$25.00
Options				
3	Web Call On Demand (MV-Web)	\$15.00	One time/mtr	
4	Utility Branded Web Page	\$500.00	1	
5	Totalization Set Up	\$10.00	One time/mtr	
6	Daily FTP Push Add-On Set Up	\$50.00	Per Custom File or Location	
On-Going Monthly Fees				
7	Daily MV-90 xi Itron Hosted Service - Base Fee (Per Endpoint) Daily calls - Pricing varies - Based on total hosting contract: 1 - 100 Endpoints	\$15.50	1	\$15.50
8	MV-Web Daily Posting Pricing varies - Based on total hosting contract: 1 - 100 Endpoints	\$10.00	1	\$10.00
Options				
9	MV-90 xi Processing for Totalization	\$10.00	Endpoint/mo.	
10	MV-90 xi File Import of Historical Data	\$3.00	Per file	
11	Web Call On Demand/On Request Fee (per read - on going)	\$0.25	Per Call	
12	File Imports Hourly - Set up Fee	\$15.00	One time	
	Monthly Service Fee	\$5.00	Per Month	
13	TOU Maintenance	\$11.00	Endpoint/mo.	
14	Additional Weekly File/Report - (per file/per month)	\$101.00	Per file/per month	

Notes and Assumptions

- (1) Services include a single file transfer:
- (2) MV-90 xi Only Customer – Daily posting of data to an FTP location.
- (3) MV-90 xi with MV-Web Customers – Daily posting of data to MV-Web.
- (4) MV-Web Login Names and Access – One (1) available for the sponsoring utility and one (1) available per each end customer with one or more Endpoints.
- (5) Operation and maintenance of head end equipment and software.
- (6) Technical support for the sponsoring utility for their deliverables.
- (7) Daily backups for production system.
- (8) UPS and generator backup power for servers.
- (9) The monthly fees include delivery of collected data in one file or format. Additional exports or file types would require an additional fee.
- (10) Taxes, duties, and tariffs are not included. All prices are in US Dollars.

Confidential

ATTACHMENT B
TERMS OF SERVICE

MV90xi and MV-Web Cloud Services

This document is to provide a brief overview of MV private cloud services as well as the data center and department that provide the services. Items listed as an option or optional, may or may not be part of your existing service and could have a fee associated with the option.

- **Datacenter and Servers**
 - Servers are updated regularly with critical o/s updates
 - Itron software installations are periodically updated with the latest applicable releases
 - Servers and databases are regularly backed up to media that is then stored offsite.
 - Redundancy is built into servers to avoid downtime should one component fail.
 - Spare servers are kept on hand to enable quick recovery from multiple failures.
 - All servers are kept in a secure, climate controlled data center separate from the Itron corporate datacenter.
 - Data center access is limited to authorized personnel including Network Operations and security personnel.
 - Server access is limited to Network Operations personnel.
 - Cloud production networks are protected by network firewalls and are separate from Itron corporate/business networks.
 - The data center is staffed 2 AM Pacific to 5 PMP Pacific Mon-Fri normal business days. A basic check is performed once a day each weekend and holiday date. During periods where we determine a large portion of our customer base is not observing the same holiday dates as Itron, Network Operations maintains a partial staffing.

- **Interrogation defaults**
 - Daily collection of data, other frequencies available as option. Daily includes weekends and holidays.
 - Standard schedule is between 22:00 and 05:00 Pacific
 - Customer may specify hours to avoid interrogation
 - Support dial-up modems (analog and digital) and IP network
 - MV-Web customers also have the option of delivering input files for MV-90 processing and posting to MV-Web

- **Missed calls and troubleshooting**
 - Retry of missed calls at 03:00 Pacific
 - Troubleshoot final list of missed calls at 07:00 Pacific, notification to customer by 08:00 Pacific of devices that cannot be reached
 - If the data collection problem is due to an error in Itron's system, Itron will attempt to fix it in a timely manner and will indicate when data collection will commence for the affected meter points. In most instances, Itron will have data loaded by noon of the following day. If the data collection problem is due to a problem at the meter site, Itron will try to identify the nature of the problem in an email notification to the Customer. It is the responsibility of the Customer to troubleshoot and repair metering and communications issues at the meter site.
 - Devices that consistently miss their calls for at least 5 workdays are placed on a list of devices that are then retried monthly. Customer is notified
 - After 6 months of no successful effort to reach the device the customer is notified again and asked if the device should be removed from the system

- **Validation of interrogation results**
 - Confirm device reached is the same device id as set up in MV90xi
 - Two calculations are made on the data retrieved, both must yield the same final result

- **Output from MV-90**
 - Exported in selected file formats
 - common formats are MDE, Lotus
 - delivered via FTP – Itron's or customer designated FTP
 - Reports - Available upon Request – MV-90 reports delivered via FTP
 - Engineering Units - Compact report
 - Engineering Units - Consumption report
 - Engineering Units - Standard report
 - Engineering Units - 44 Highest Peaks
 - Engineering Units - Energy report
 - Non-Coincident Peaks Report
 - Option - post to MV-Web, within 15 minutes of validation completion
 - Option – MV-90 reports delivered via FTP
 - TOU
 - Billing Files
 - Events

- **Optional Input files for MV-90 processing MV-Web customers**
 - Files with historical data from another system
 - Supported formats include HHF, PDF, MDE

STAFF REPORT

To: Mayor Dent
From: Todd Baun- Director of Public Works
Date: March 20, 2015
Re: ATV Proposed Routes

At the March 11th Council meeting, Councilman Schiller asked for a map of proposed routes for ATV users.

I have attached a map that I highlighted, in red, roads I believe would be too dangerous for ATV users to use. You will notice I have highlighted HWY 108 (AKA Simpson Ave and Summit Rd) and I also highlighted 3rd Street. These 3 roads provide the majority of traffic into the City and I believe that if ATV are mixed in with our major traffic routes, it is a recipe for trouble. Also considered was speed limits on these roads. Simpson Ave, west of the cemetery, and Mox Chehalis posted at 40 MPH. Summit Rd has sight distance issues and although it's posted at 30 MPH, a majority of speeding infractions come from Summit Rd.

I have highlighted, in blue, the roads I believe would be safe enough for ATV use. These routes are on roads that are 25 MPH. These roads provide adequate sight distances, have less traffic and are safer with the lower speed limit.

Action Requested:

Please review and discuss. Let me know if you would like to make any changes or have any suggestions on the routes.

STAFF REPORT

To: Mayor Dent
From: Todd Baun- Director of Public Works
Date: March 20, 2015
Re: 3rd Street Design question.

We have gotten 60% completion plans on our 3rd Street Improvements design. With this stage of the design, we have many questions that our engineers, crew and I can answer.

The one major question that we still need to answer is what to do with 2nd Street. Does the City prefer to have 2nd Street open or closed?

We still have the options that we discussed several months ago.

- Open 2nd street to traffic. Make it a one way North/South. With 3rd Street getting realigned, this will eliminate the current sight distance issues that currently has 2nd Street closed.
- Close 2nd street to traffic. 2nd Street only serves 2 lots and will only have 2 drive approaches. Skillings may be able to come up with suitable turn around for emergency vehicles.

Action Requested:

Please review and discuss. Let me know if you would like more information or if you have any answers/suggestions I can take back to the Skillings Connolly.

STAFF REPORT

To: Mayor Dent
From: Todd Baun- Director of Public Works
Date: March 20, 2015
Re: 3rd Street Contract Time Extension

Please read attached proposal to have 3rd Street design contract extended. This is for a time extension only with no design cost increase.

Action Requested:

Please accept and authorize the mayor to sign the contract time extension.

STAFF REPORT

To: Mayor Dent
From: Todd Baun- Director of Public Works
Date: March 20, 2015
Re: Accident Prevention Program

On January 14th, 2015, the City had a Labor and Industries (L&I) consultation at our Light and Power shop. We were found to have several serious hazards and general hazards that were identified. Light and Power has done a great job at correcting all the hazards except the hazards that involve the Accident Prevention Program. (APP). That is where I have been working with our crews and safety committee to update and basically create a new APP for the City to use. Creating this has taken many hours from start to completion of the roughly 150+ pages of this program.

I have a draft copy available for review if you would like to read it and make suggestions or have any comments.

Action Requested:

Please accept this draft and adopt as the City of McCleary Accident Prevention Program.

STAFF REPORT

To: Mayor Dent
From: Todd Baun- Director of Public Works
Date: March 20, 2015
Re: Storm Pond Discussion

We have several privately owned storm ponds in the city that are currently not maintained and do not meet our maintenance standard outlined in Dept. of Ecology's 2005 Stormwater Management Manual Volume V.

We have sent residents and land owners (142) of Cedar Heights, Evergreen Heights 2, Evergreen Heights 1, and Summit Place 2, a letter asking how they would want to have their storm ponds maintained. We have outlined the following options for those residents and gave until March 20th to let us know their preferred option.

Option #1- Consists of Homeowners bringing their storm pond up to standards at homeowners cost. Homeowners can then deed their storm pond to the City for continued maintenance. If deeded to the City, this option would add an additional \$0.81 to your base storm water charge.

Option #2- The City will come in and bring your storm pond up to standard. This will add an additional \$6.55 to your base storm water charge for 1 year. Homeowners can then deed their storm pond to the City for continued maintenance. After the first year, this option would drop to add an additional \$0.81 to your base storm water charge.

Option #3- The Homeowners can bring their storm pond up to standard and maintain on their own. This adds no additional cost to the base storm water charge. In the event that the homeowner's storm pond is not brought up to standard and maintained, the City will then come in and charge homeowners the equipment and labor fees to bring the storm pond up to standard and maintenance costs.

The main issue that I'm finding is the Homeowner Association issue. These developments all have some type of Homeowner Association that is supposed to maintain the ponds. The issue is the Homeowners Associations do not take effect until the development is built out to a certain completion.

I have received a variety of responses from residents in each development.

- Cedar Heights residents has chosen Option #3- see letter attached
- Evergreen Heights 1 has chosen Option #2
- Summit Place 2- Most residents has chosen Option #2 and most land owners have chosen Option #3
- Evergreen Heights 2- Land owner has not confirmed choice.

Action Requested:

Please provide recommendations on how you would like to proceed on this matter.

ORDINANCE NO. _____

AN ORDINANCE RELATING TO MOTOR VEHICLES, AUTHORIZING THE UTILIZATION OF CERTAIN WHEELED ALL-TERRAIN VEHICLES UPON CERTAIN STREETS OF THE CITY UNDER CERTAIN TERMS AND CONDITIONS, ADDING NEW SECTIONS TO CHAPTER 10 OF THE MUNICIPAL CODE AND IMPOSING PENALTIES FOR VIOLATION.

R E C I T A L S :

1. The Legislature, through the adoption of ESHB 1632 in 2013, authorized the operation of certain wheeled all-terrain vehicles upon public rights of way so long as the vehicles and their operators meet certain requirements.
2. Since that adoption, the provisions of that Act which were applicable to such activities have been incorporated into the Model Traffic Ordinance (MTO) by rule issued by the state agency having jurisdiction.
3. The City has adopted the MTO by reference, as well as any modifications therein. However, the provisions of the Bill specifically provided that, before the provisions allowing the use of such vehicles upon streets within the City, the Council and Mayor had to adopt an ordinance specifically authorizing such activity.
4. At its January 28th meeting, the Council discussed whether such utilization should be allowed. Chief Crumb has made available material which he has gathered upon this matter. After

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02/02/2015
dg/le

CITY OF McCLEARY
100 SOUTH 3RD STREET
McCLEARY, WASHINGTON 98567

review of written material provided by Chief Crumb and having considered the matter, including the potential implications, both positive and negative, of taking such an action, and having received limited public comment, the Council has determined it to be appropriate to allow such utilization upon streets within the City.

NOW, THEREFORE, BE IT ORDAINED AS FOLLOWS BY THE CITY COUNCIL OF THE CITY OF McCLEARY:

SECTION II: Incorporation of Provisions Into MTO: The incorporation into the City Code of the provisions of ESHB 1632, as now codified in Title RCW 46, relating to the definitions, equipment, and licensing requirements, operator requirements, and other provisions applicable to this matter is specifically ratified.

SECTION II: A. Operators meeting the requirements set forth in the applicable provisions of the MTO and licensing requirement established in sub-paragraph B of this Section may operate a wheeled all-terrain vehicle meeting the equipment and licensing requirements set forth in the Model Traffic Ordinance upon all public streets within the City other than any street having a speed limit greater than thirty-five miles per hour.

B. No person shall operate a wheeled all-terrain vehicle upon a public street pursuant to the provisions of this ordinance unless that person has been issued and is in possession of a valid driver's license.

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02/02/2015
DG/le

CITY OF McCLEARY
100 SOUTH 3RD STREET
McCLEARY, WASHINGTON 98557

SECTION III: Penalties:

A. Unless stated otherwise in any other applicable provision of the Municipal code, violation of any provisions of this ordinance is a traffic infraction, punishable as provided by the provisions of the Municipal Code; PROVIDED THAT, if the vehicle is operated in a negligent or reckless manner by the operator or the operator is in such a condition as to be subject to citation under the provisions of RCW 46.61.502 through RCW 46.61.540, inclusive, such citation may be issued and, upon conviction, the penalties provided therein shall be applied.

B. The parent or legal guardian of a minor who knowingly allows a minor who [1] is less than the age of 18 years and [2] does not possess the licensing required by the applicable provisions of this ordinance, including Section II, to operate a vehicle the use of which is authorized by this ordinance shall be deemed to have committed a traffic infraction and, upon a finding of committed, shall be subject to imposition of the fiscal penalty in the same amount to which the operator is subject.

SECTION IV: If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance. The Council declares that it would have passed this Ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections,

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02/02/2015
DG/La

CITY OF McCLEARY
100 SOUTH 3RD STREET
McCLEARY, WASHINGTON 98557

subsections, sentences, clauses, or phrases had been declared invalid or unconstitutional, and if for any reason this Ordinance should be declared invalid or unconstitutional, then the original ordinance or ordinances shall be in full force and effect.

SECTION V: Sections I, II, and III shall be codified as new sections in Chapter 10.04 of the Municipal Code, being the chapter providing for the adoption of the Model Traffic Ordinance.

SECTION VI: This Ordinance shall take effect upon the fifth day following date of publication.

SECTION VII: Corrections by the Clerk-treasurer or Code Reviser. Upon approval of the Mayor and City Attorney, the Clerk-treasurer and the Code Reviser are authorized to make necessary corrections to this ordinance, including the correction of clerical errors, references to other local, state, or federal laws, codes, rules, or regulations, or ordinance number and section/subsection numbering.

PASSED THIS _____ DAY OF _____, 2015, by the City Council of the City of McCleary, and signed in approval therewith this _____ day of _____, 2015.

CITY OF McCLEARY:

D. GARY DENT, Mayor

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02/02/2015
DG/Le

CITY OF McCLEARY
100 SOUTH 3RD STREET
McCLEARY, WASHINGTON 98557

ATTEST:

WENDY COLLINS, Clerk-Treasurer

APPROVED AS TO FORM:

DANIEL O. GLENN, City Attorney

STATE OF WASHINGTON)
 : ss.
GRAYS HARBOR COUNTY)

I, WENDY COLLINS, being the duly appointed Clerk-Treasurer of the City of McCleary, do certify that I caused to have published in a newspaper of general circulation in the City of McCleary a true and correct summary of Ordinance Number _____ and that said publication was done in the manner required by law. I further certify that a true and correct copy of the summary of Ordinance Number _____, as it was published, is on file in the appropriate records of the City of McCleary.

WENDY COLLINS

SIGNED AND SWORN to before me this _____ day of _____, 2015, by WENDY COLLINS.

NOTARY PUBLIC IN AND FOR THE STATE OF WASHINGTON, Residing at:
My appointment expires:

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02/02/2015
DG/le

CITY OF McCLEARY
100 SOUTH 3RD STREET
McCLEARY, WASHINGTON 98557

ORDINANCE NO. _____

**AN ORDINANCE GRANTING A REQUESTED
FRANCHISE TO ASTOUND BROADBAND, LLC UPON
CERTAIN TERMS AND CONDITIONS, ESTABLISHING
AN EFFECTIVE DATE AS PROVIDED BY RCW
35A.47.040, AND PROVIDING FOR
SEVERABILITY.**

R E C I T A L S :

1. Astound Broadband, LLC, a limited liability company licensed to do business in the State of Washington, has submitted a request to be granted a non-exclusive franchise to utilize rights of way within the corporate limits for the installation, utilization, and maintenance of fiberoptic tele-communication lines and associated facilities.

2. As authorized by RCW 35A.21.020 and RCW 35A.47.040, the Council has considered the request after having the opportunity to receive citizen input.

3. After consideration of the potential benefits to the citizens of the City and the County, the Council finds such a grant to be in the best interests of the City subject to compliance with certain terms and conditions.

NOW, THEREFORE, BE IT ORDAINED AS FOLLOWS BY THE
CITY COUNCIL OF THE CITY OF McCLEARY:

SECTION I: A Franchise is hereby granted to ASTOUND BROADBAND, LLC, a limited liability company in the State of Washington, its successors and assigns; hereinafter referred to as the GRANTEE, for a period of fifteen (15) years from and after the date of adoption of this ordinance to construct, operate, and maintain fiber optic telecommunication lines and system facilities in, over, along, and under public rights of way within the corporate limits of the City, as they now exist and may hereafter be expanded.

This franchise is granted upon the terms and conditions set forth in the following sections.

SECTION II: Scope of Authority: Subject to compliance with any requirements for prior notice, permitting, and authorization, ASTOUND BROADBAND, LLC, its successors and assigns, (hereinafter the GRANTEE) shall have the right and authority to enter upon the public roads and rights-of-way within the corporate limits for the purpose of constructing its fiber optic telecommunication lines and system and all necessary facilities connected therewith (hereinafter referred

to collectively as the DISTRIBUTION SYSTEM) and for repairing, operating, and maintaining said distribution system.

SECTION III: Construction Conditions:

3.1. Construction to be Approved by the Director of Public Works. All construction and installation work where crossing roads, streets, alleys, or rights-of-way within the corporate limits shall be subject to the prior approval of and pass the inspection of the Building Official, after consultation with the Director of Public Works (the Director) or their respective designees.

3.2. Permit Application, Review & Approval.

A. Prior to commencement of construction or modification of any portion or element of the distribution system and associated elements which will result in or require utilization or modification of City property or restriction upon utilization or public access, Grantee shall first file with the Building Official its application for a permit to do such work, together with duplicate plans and specifications showing the position, depth, and location of all lines and facilities sought to be constructed, laid, installed or erected at that time, which shows their relative position to existing streets, roads, alleys, or rights-of-way upon plans

drawn to scale, hereinafter collectively referred to as the "Map of Definite Location." It shall concurrently provide a copy of the documents to the Director.

B. The plans and specifications shall designate the class and type of material and equipment to be used, manner of excavation, construction, installation, back fill, erection of temporary structures, erection of permanent structures, traffic control, traffic turnouts, road obstructions, etc. No such construction shall begin without the Grantee first securing a written permit from the Building Official, including approval endorsed on one set of plans and specifications which will be returned to the Grantee. All such work shall be subject to the approval of and shall pass the inspection of the Building Official, in consultation with the Director.

C. In addition to any permit fee required, in recognition of the potentiality of the requirement of specialized inspection services, the Grantee shall pay those reasonable costs and expenses incurred in the examination, inspection, and approval of such work on account of granting of the permit pursuant to RCW 35.21.860, as now existing or hereafter amended or succeeded.

D. The improvements installed pursuant to the authorization of a permit issued pursuant to this grant, including the initial distribution system, shall be laid in substantial conformity with said Map of Definite Location, except in instances where deviation may be allowed thereafter in writing by the Building Official pursuant to application by Grantee.

E. A set of as-built maps of Grantee's lines or facilities shall be furnished to the Director within sixty (60) days after completion of the work.

3.3. Roads to be Replaced & Restoration Guaranteed by Bond.

A. In any work which requires breaking of surface of a public road, street, alley, or right-of-way subject to this franchise for the purpose of laying, relaying, connecting, disconnecting, and repairing the said distribution system, and making connections between the same to structures and buildings of consumers, or making connections to other facilities of the Grantee now in existence or hereafter constructed, the Grantee shall be governed by and conform to the standards and specifications set forth by the Director.

B. The Grantee at its own expense and within a reasonable time period shall complete the work for which the surface has been broken and promptly replace the work and make good the street, road, alley or right-of-way, restoring the same to as good condition as before the work was commenced; PROVIDED, however, that no such breaking of the surface of the streets, alleys, roads, or rights-of-way shall be done prior to the obtaining of the permit issued by the Building Official; PROVIDED, however, that in cases of emergency arising outside of normal office hours when an immediate excavation may be necessary for protection of public or private property, the necessary excavation may be made and shall be reported to the Director in the manner herein provided as soon as practical, but in no case later than the next following business day.

C. Application for the permit required as a condition precedent of the work covered by this section shall be accompanied by specifications for the restoration of the street, alley road, or rights-of-way to the same condition as it was in prior to such breaking, and such specifications must be approved by the Director before such breaking of the surface is commenced. The Grantee shall pay those costs and

expenses incurred in the examination, inspection, and approval of such restoration pursuant to RCW 35.21.860, as now existing or hereafter amended or succeeded.

D. In the event the Grantee, after receiving notice from the Director or designee, fails to correct a condition in a timely manner, the Director may undertake, order, or have done any and all work that is reasonably considered necessary to restore to a safe condition any such street, alley road, or right-of-way left by the Grantee or its agents in a condition dangerous to life or property, and the Grantee, upon demand, shall pay to the City all costs associated with or arising from such corrective action.

3.4. General Conditions & Reservation of Rights.

A. Minimum Interference with Public Travel, Grantee Liable for Damage. All work done under this franchise shall be done in a thorough and workmanlike manner. The Grantee shall leave trenches, ditches, and tunnels necessary in the laying of fiber optic or other telecommunications system distribution lines, the openings of trenches and the construction of other facilities in such a way as to interfere as little as possible with public travel and shall take all due and necessary precautions to guard the same so that damage

or other injury shall not arise or occur by reason of such work; where any such trenches, ditches, or tunnels are left open at night, the Grantee shall place warning lights and barricades at such a position as to give adequate warning of such work. The Grantee shall be liable for any injury to person or persons, or damage to property sustained through its carelessness or neglect, or through any failure or neglect to properly guard or give warning of any trenches, ditches or tunnels dug or maintained by the Grantee.

B. All City Road Rights Reserved. The City in granting this franchise does not waive any rights which it now has or may hereafter acquire with respect to City roads, rights-of-way, or other City property, and this franchise shall not be construed to deprive the City of any powers, rights, or privileges which it now has or may hereafter acquire to regulate the use of and to control the City roads, rights-of-way, and other City property covered by this franchise.

C. City may Change and Improve Roads Without Liability.

1. If at any time the City determines it appropriate to improve or change any City road, right-of-way,

or other City property subject to this franchise, whether by grading or regrading, planking or paving the same, changing the grade, altering, changing, repairing or relocating the same, by construction of drainage facilities, or in any other manner, the Grantee shall, upon reasonable notice by the City and after reasonable evaluation of alternatives by the City in cooperation with the Grantee, at its own expense, move and change any items, attachments, or appurtenances it has installed pursuant to the rights granted by this ordinance to conform to such public improvement. The City will avoid the need for such moving or changing whenever reasonably possible.

2. In the event Federal, State, or other funds are specifically available for utility relocating purposes, the City shall apply for such funds and the Grantee will be reimbursed to the extent any such funds are actually obtained for utility relocating purposes.

3. The City shall in no way be held liable for any damage to said Grantee that may occur by reason of any of the City's improvements, changes, or works above enumerated, except for damage caused solely by negligence of the City's employees or agents.

4. All work performed by the Grantee under this section shall be under the direction and approval of the Director and shall be subject to the Director's approval. The Grantee shall pay those costs and expenses incurred in the examination, inspection and approval of such work.

D. Notice of Activities by the City. The laying, construction, operation, and maintenance of the Grantee's distribution system authorized by this franchise shall not preclude the said City, its agents or its contractors from blasting, grading, excavating, or doing other necessary road work contiguous to the said lines and facilities of the Grantee providing the Grantee shall be given five (5) business days' |

notice of said work: PROVIDED THAT, the necessity of such notice shall be deemed waived if the work in question is required to be commenced immediately due to the threat to public safety.

E. Reference, Monuments and Markers. Before any work is performed under this franchise which may affect any existing monuments or markers of any nature relating to subdivisions, plats, roads and all other surveys, the Grantee shall reference all such monuments and markers. The reference

points shall be so located that they will not be disturbed during the Grantee's operations under this franchise. The method of referencing these monuments or other points to be referenced shall be approved by the City Engineer. The replacement of all such monuments or markers disturbed during construction shall be made as expeditiously as conditions permit, and as directed by the Director. The cost of monuments or other markers lost, destroyed or disturbed and the expense of replacement by approved monuments shall be borne by the Grantee.

F. Vacation of City Streets, Roads, Alleys, or Rights of Way. If at any time the City determines it appropriate to vacate any City road, street, alley, or right-of-way which is subject to rights granted by this franchise and said vacation, then the City shall give ninety (90) days written notice to the Grantee, and may at their option, after granting a reasonable alternate route, terminate this franchise with reference to such vacated City street, alley, road, right-of-way: PROVIDED THAT, the vacation shall be subject to the grant to the Franchisee of a reasonable time to relocate at its sole expense the facilities it had installed

in the vacated property. The City shall not be liable for any damages or loss to the Grantee by reason of such termination.

SECTION IV: Taxes, Fees, and Financial Controls.

4.1. Washington law, RCW 35.21.860, **currently limits** the tax City may impose on Grantee's activities under this Ordinance to **six percent** (6%) of revenue derived from the provision of network telephone service and otherwise prohibits City from imposing a franchise fee or other fee or charge for Grantee's use of the right-of-way. In addition, the federal Internet Tax Freedom Act prohibits the imposition of a tax or other fee on revenue derived from Grantee's provision of internet access services. If federal or Washington law is changed such that City may impose a franchise fee, tax, or other charge on Grantee's services, or if City elects to impose on providers within the City a tax on network telephone service under RCW 35.21.860, **other than that currently imposed pursuant to Chapter 3.24 of the Municipal Code, as now existing or hereafter amended or succeeded, the** City shall provide Grantee with at least 6 months' written notice of its intent to revise this Ordinance or otherwise impose such a fee, tax, or charge. **In recognition of the state and federal limitation, at this time** the City will not require the payment

of a franchise fee, but specifically reserves the right to require the commencement of such a payment under the following terms and conditions:

A. Commencement: The City shall give the Grantee written notice no less than six months before the date upon which the fee will begin to be assessed. The fee shall be in an amount no greater than the maximum allowed by applicable law from the gross revenue upon which the fee may be imposed derived from the operation of Grantee's system to provide service in the Franchise Area; PROVIDED THAT, the fee may be initially set at a lesser figure, but may be adjusted by action of the City Council on an annual basis and in such event the City shall provide Grantee with not less than six months notice.

B. For purposes of determination of the amount to be paid in the event a franchise fee is established such definitions as may be set forth in the applicable federal law shall apply; PROVIDED THAT, in the absence of any such definitions, the following definitions shall apply:

1. "Gross Subscriber Revenues" is defined to mean all amounts derived by Grantee in whatever form and from all sources, from the operation of Grantee's telecommunications

system to provide telecommunications service within the Franchise Area. "Gross Subscriber Revenues" shall include all amounts for all telecommunications services including internet services to the extent permitted by applicable law.

2. "Gross Subscriber Revenues" shall not include bad debt, sales taxes, or other taxes and fees that are collected by Grantee on behalf of, and for payment to, the local, state, or federal government. The Franchise fees are in addition to all other fees, assessments, taxes, or payments of general applicability that the Grantee may be required to pay under any federal, state or local law.

This Franchise and the Franchise fees paid hereunder are not in lieu of any other generally applicable required permit, authorization, fee, charge, or tax.

3. Grantee's Franchise fee payments to City shall be computed semiannually on June 30 and December 31. Each semiannual payment shall be due and payable no later than thirty (30) days after the last day of the preceding semiannual calendar period.

4.2 Acceptance of Payment and Recomputation. No acceptance of any payment shall be construed as an accord by City that the amount paid is, in fact, the correct amount, nor

shall any acceptance of payments be construed as a release of any claim City may have for further or additional sums payable or for the performance of any other obligation of Grantee.

4.3. Semiannual Franchise Fee Reports. Each payment shall be accompanied by a report to the City, containing an accurate statement in summarized form.

4.4. Audits. Upon thirty (30) days' prior written notice, City shall have the right to conduct an independent audit of Grantee's records reasonably related to the administration or enforcement of this Franchise, in accordance with generally accepted accounting principles. The City may hire an independent certified public accountant to audit the Grantee's financial records, in which case the Grantee shall provide all necessary records to the certified public accountant. If the audit shows that Franchise fees have been underpaid by ten percent (10%) or more, Grantee shall pay the cost of the audit in an amount not to exceed five thousand dollars (\$5,000) per year being audited.

4.5. Additional Commitments Not Franchise Fees. The Grantee may, in lieu of all or a portion of tax or fee payment required pursuant to the provisions of this ordinance, provide telecommunications or other services to the City or

its affiliated entities. Any agreement for the provision of such services will be as mutually agreed by the parties in separate documentation, and the offset value of any such services provided to the City or its affiliated entities will be determined based on the standard rates Grantee charges to third-party customers for substantially equivalent services.

4.6. Costs of Publication. Grantee shall pay the reasonable cost of newspaper notices and publication pertaining to this Franchise and any amendments thereto, as such notice or publication is reasonably required by City or applicable law.

4.7. Tax Liability. Payment of any Franchise fees which may be imposed upon Grantee under this Franchise shall not exempt Grantee from the payment of any generally applicable license, permit fee, or other generally applicable fee, tax or charge on the business, occupation, property, or income of Grantee that may be imposed by City.

4.8. Payment on Termination. If this Franchise terminates for any reason, the Grantee shall file with the City within ninety (90) calendar days of the date of the termination, a financial statement, certified by an independent certified public accountant, showing the Gross

Subscriber Revenues received by the Grantee since the end of the previous fiscal year. The City reserves the right to satisfy any remaining financial obligations of the Grantee to the City by utilizing the funds available in security provided by the Grantee.

SECTION V: Grantee to Indemnify City; Liability Insurance.

5.1. The Grantee does hereby agree to protect and save harmless said City from all third party claims, actions, or damages of every kind and description which may be asserted against such City by reason of the Grantee's negligent or intentional acts in connection with the construction, operation, and maintenance of said distribution system.

A. In case that a suit or action is brought against the City for damages arising out of or by reason of the above-mentioned causes, the Grantee will, upon notice to it of the commencement of said action, defend the same at its sole cost and expense.

B. In case a final judgment shall be rendered against the City in such suit or action, the Grantee will fully satisfy said judgment within ninety (90) days after said suit or action shall have finally been determined by a trial

court, appellate court or courts, if appeal be taken, if determined adversely to said City.

C. Upon Grantee's failure to satisfy any such final judgment within the ninety (90) day period, the City, by action of the City Council, may upon due notice terminate this franchise and the City shall have a lien upon the distribution system which may be enforced against the property for the full amount of any such final judgment so taken against said City: PROVIDED THAT, such lien shall not restrict the City from taking any lawful action to collect any balance of such judgment, as well as the reasonable costs and fees incurred by the City in taking the collection action.

5.2. For the purpose of securing to the City full and complete performance of the covenants contained in this paragraph, the Grantee shall, at its own expense, procure and keep in force during the life of this franchise, liability insurance in a company or companies to be approved by the City, the minimum limits of such insurance to be not less than \$2,000,000 and such additional proof thereof shall be furnished to the City from time to time as it shall require. The policy shall be of an occurrence nature. Upon request of

the City, the minimum limits of insurance shall be changed to reflect inflationary (cost of living) costs increases.

5.3. Acceptance by the City of any work performed by the Grantee at the time of completion shall not be grounds for avoidance of this covenant.

SECTION VI: Franchise Not Exclusive. This franchise shall not be deemed to be an exclusive franchise. It shall in no manner prohibit said City from granting other franchises of like nature or franchises for other public or private utilities under, along, across, over, and upon any of the City streets, alleys, roads, or rights-of-way subject to this franchise.

SECTION VII: Provisions Bind Successor. All provisions, conditions, regulations and requirements herein contained shall be binding upon the successors and assigns of the Grantee, and all privileges, as well as all obligations and liabilities of the Grantee, shall inure to its successors and assigns equally as if they were specifically mentioned wherever the Grantee is mentioned.

SECTION VIII: Revocation for Non-Compliance. If the Grantee shall willfully violate or fail to comply with any of the provisions of this franchise through willful or

unreasonable neglect after the giving of written notice of such violation or failure to comply or fail to heed or comply with any other notice given the Grantee under the provisions of this grant, then Grantee shall forfeit all rights conferred hereunder, and this franchise may be revoked or annulled by the City, by action of the City Council, PROVIDED, however, that the City shall give thirty (30) days written notice of its intention to revoke or annul the franchise during which period the Grantee shall have the opportunity to remedy the situation.

SECTION IX: Grantee to File Acceptance. The full acceptance of this franchise and all its terms and conditions by Astound Broadband, LLC, in writing within thirty (30) days from the date of execution of this Ordinance by the Mayor, is to be filed with the Clerk-treasurer of the City, and shall be a condition precedent to its taking effect, and unless the franchise is accepted within such time, this grant shall be null and void.

SECTION X: Notifications, Venue & Associated Matters.

10.1. Any notice provided for or concerning this franchise to be sent to the Grantee shall be in writing and be

deemed sufficiently given when either [a] personally served upon the authorized representative of the other party or [b] sent by certified or registered mail, return receipt requested, and first class mail to the address of the other set forth in the following paragraphs.

A. The address of the Grantee is Astound Broadband, LLC, 401 Kirkland Parkplace, Kirkland, WA 98033 Attention: Steve Weed, CEO, and Jim Penney, EVP.

B. The address of the City is 100 South 3rd Street, McCleary, Washington 98557 Attention: Wendy Collins, Clerk-treasurer.

In recognition that the individuals named may leave those positions or the parties relocate, a notice shall be deemed properly addressed if it is sent to the indicated address to the attention of the position designate unless a successor address has been provided pursuant to the following paragraph. A notice shall be deemed to have been given upon the date of service, if personally served, or upon the fifth business day following its mailing, properly addressed and postage prepaid.

Either party may from time to time notify the other party in writing of a change of address to which notifications

are to be sent. In the absence of such notification, the addresses set forth above shall be deemed applicable,

10.2. In the event of any litigation arising out of the performance of this Contract, it is agreed the Courts of the County of Grays Harbor, State of Washington, shall be Courts of proper venue. Further, in addition to any other relief which may be granted to the prevailing party, the Court may award the prevailing party reasonable attorneys' fees and costs.

SECTION XI: If any section, subsection, sentence, clause, or phrase of this Ordinance is for any reason held to be invalid or unconstitutional, such decision shall not affect the validity of the remaining portions of this Ordinance. The Council hereby declares that it would have passed this Ordinance and each section, subsection, sentence, clause, and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses, or phrases had been declared invalid or unconstitutional, and if for any reason this Ordinance should be declared invalid or unconstitutional, then the original ordinance or ordinances shall be in full force and effect.

SECTION XII: In recognition of the provisions of state law, including but not limited to RCW 35A.47.040, this Ordinance shall take effect upon the fifth day following date of publication.

SECTION XIII: Corrections by the Clerk-treasurer or Code Reviser. Upon approval of the Mayor and City Attorney, the Clerk-treasurer and the Code Reviser are authorized to make necessary corrections to this ordinance, including the correction of clerical errors, references to other local, state, or federal laws, codes, rules, or regulations, or ordinance number and section/subsection numbering.

PASSED THIS _____ DAY OF _____, 2015, by the City Council of the City of McCleary, and signed in approval therewith this _____ day of _____, 2015.

CITY OF McCLEARY:

D. GARY DENT, Mayor

ATTEST:

WENDY COLLINS, Clerk-Treasurer

